



**Mutua v Centenary Sacco Society Limited (Civil Appeal E174 of 2021)  
[2024] KEHC 13724 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13724 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E174 OF 2021  
LW GITARI, J  
OCTOBER 31, 2024**

**BETWEEN**

**DR STEPHEN MAKAU MUTUA ..... APPELLANT**

**AND**

**CENTENARY SACCO SOCIETY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The appeal arises from the proceedings in the Co-operative Tribunal Case No. 116/2020. In the case the appellant had fled a claim dated 5/3/2020 and amended on 26/8/2020 wherein he was seeking judgment against the respondent for: -
  1. A mandatory order of injunction compelling the respondent to immediately un-freeze the claimant's BOSA & FOSA accounts held with the respondent.
  2. A declaration that the freezing of the claimants account was unprocedural, illegal and malicious.
  3. General punitive and exemplary damages to the illegal unprocedural and malicious freezing of the claimant's BOSA and FOSA accounts.
  4. Costs and interests of the suit.
2. The tribunal entered judgment against the respondent and ordered it to unfreeze the appellant's account unconditionally and also awarded him costs. The appellant was dissatisfied with the judgment and lodged the instant appeal based on six grounds of appeal dated 17/12/2021. These are: -
  1. That the Tribunal erred in law and in fact, by finding and holding that the respondent had adequately explained the rationale and justification for the freezing of the claimant's accounts, yet the claimant had let overwhelming evidence to prove that the actions of the respondent were illegal, malicious and unnecessary.



2. That the Tribunal erred in law by failing to find that the respondent had no basis to freeze the Appellant's accounts on the basis of the actions of a 3<sup>rd</sup> party and no fault of the Appellant.
  3. That the Tribunal erred in law and in facts by failing to find that the respondent had pleaded at paragraph 9 of its defence that it had nothing against the claimant and as such, the respondent was bound by its pleadings.
  4. That the Tribunal erred in law by finding that the claimant had proved his claim but ignored, failed and/or refused to award the Claimant damages for the malicious actions of the respondent.
  5. That the Tribunal erred in law by failing to clarify whether the defence by the respondent, based on the provisions of the *Proceeds of Crime and Anti-Money Laundering Act* No. 9 of 2009 (POCAMLA) was plausible or a good reason to freeze the Appellant's accounts.
  6. That the Tribunal's decision is shallow and against the weight of the facts, law and authorities placed before the Tribunal.
3. The appellant prays that the appeal be allowed and the court do assess damages as per prayer -c- of the Amended Statement of Claim dated 26/08/2020.
  4. The respondent has opposed the appeal and filed written submissions.

#### **Summary of the Appellants claim before the Tribunal**

5. The appellant stated that he was a member of the Respondent vide membership No. 37xxx and operates a shares account vide the said membership and also operates a Fosa Account No. 5-05-xxxxxx-xx with the respondent. On various dates between 30/8/2019 and 29/11/2019 he transacted on BOSA Account. He also transacted on his Fosa Account on 14/12/2019 when he electronically transferred Kshs.505,000/= through Pesa-link Money Services from his account held at Standard Chartered Bank Account No. 01003xxxxxxxx which amount was duly received into the claimant's Fosa Account held with the respondent.
6. It is the claimant's contention that the respondent without any lawful or reasonable excuse froze his account since 17/2/2019 making the claimant unable to access and operate the said account. The appellant avers that the actions of the respondent were malicious and meant to unnecessarily punish the claimant since all the transactions were done within the law. The plaintiff claimed punitive and exemplary damages.

#### **The respondent's case**

7. That on 27/08/2019 a sum of money amounting to Kshs.744,000/= was arbitrarily deposited into the Sacco's Fosa bank account held at Co-operative Bank Meru Branch by PW2, one Salome Gacheri Romano who is a spouse of PW1, the claimant, and who was an employee of the Sacco with no disclosure at all as to the source and purpose of the same.
8. On the same date the same money amounting to Kshs.744,000/= was moved from Centenary Sacco's FOSA Account at Co-operative Bank Meru Branch and credited to the personal account (account number 3-03-xxxxxx-xx) of one Salome Gacheri Romano held within the respondent without due course and without any disclosures. That upon investigation, it was noted that the said money amounting to Kshs. 744,000 had been arbitrarily deposited in the Sacco's Bank account with no disclosure at all as to the source and purpose of the same.



9. That accounts inspections was conducted and revealed that on 29<sup>th</sup> August, 2019 PW2, one Salome Gacheri Romano following un-procedural and outright abuse of powers and privileges facilitated account opening for the claimant member 37525. The said account was opened without proper supporting documentation and necessary disclosures and by unauthorized persons. The Sacco requested to be furnished with the supporting documents including account opening bio-data but these documents were not supplied.
10. That on 2<sup>nd</sup> September, 2019, PW2 Salome Gacheri Romano withdrew Kshs. 492,200/= from her Sacco account which was part of the Kshs. 744,000/= and deposited Kshs. 510,000/= into the claimant's Sacco account. These two transactions (the withdrawal and deposit) were done simultaneously by PW2 without the presence of the claimant. Further as per the Sacco statements of PW2 and the claimant all the stated transactions were done under the instructions of one PW2 and authorized by the same PW2 despite being own and in favor of related party who is the claimant. This put into question the reason for self-authorization on own transaction as well as those of related parties. The transaction was authorized by the claimant's spouse, PW2 against the Sacco's procedural requirements. This brought suspicion as to why this money would not be moved straight from the undisclosed source instead of getting to the Sacco's account then to the account of PW1 from where it was withdrawn and deposited into the claimant's account.
11. That again on 14/12/2019 a sum of money amounting to Kshs. 505,000/= was arbitrarily deposited into the Sacco's Fosa bank account held at Co-operative Bank Meru Branch by the claimant with no disclosure at all as to the source and purpose of the same. The said Kshs. 505,000/= was then credited into account No. 5-05-010314-01 (at the Sacco) belonging to the claimant.
12. Despite various requests to produce supporting documents which would go a long way in compliance with the laws governing the Sacco, the claimant and her spouse refused to produce the documents required and to disclose the source and purpose of the funds.
13. The Sacco decided to carry out investigations on all these transactions. The supervisory committee therefore through the audit department recommended holding this account un-transactionable until proper supporting documents are produced showing the source of these funds and why it was necessary to channel it through the Sacco account instead of directly to the beneficiary's account.
14. The Tribunal held that the claimant had proved his claim and ordered the respondent to un-freeze the claimant's account unconditionally. The Tribunal did not award damages which the appellant was seeking nor did it give reasons for not awarding general damages which was one of the prayers the appellant was seeking and hence the filing of this appeal

### **The Appeal**

15. The appeal was canvassed by way of written submissions.

### **The Appellant's Submissions**

16. He submits that the respondent without any notice or explanation froze the accounts of the appellants. That the respondent did not produce any evidence to prove that they sent a notice inviting the appellant to explain the transactions/funds as pleaded by the respondent. Instead the respondent pleaded that the accounts were frozen on the recommendation of the Respondents supervisory committee.
17. He submits that the freezing of the account was arbitrary and whimsical and without any notice to the appellant. That the respondent simply condemned him unheard. He has urged the court to find



that the freezing of the accounts was illegal malicious and unnecessary and breached article 40 of *the Constitution* of Kenya and the right to be heard. He relied on Charles Gathara Muruthi -Vs- Kenya National Highway Authority [2019]eKLR, Doa Doa Tented Camps & Lodges Limited -Vs- Jubilee Insurance Company of Kenya Limited [2021]eKLR.

18. The appellant submits that the respondent had a duty to clear him before freezing his accounts. He relies on Viable Deco Solutions Limited -Vs- Co-operative Bank of Kenya Ltd [2014]eKLR. He submits that the respondent had no basis to freeze his accounts.
19. He submits that the Tribunal held that the claimant had proved his claim and ordered the unfreezing of his accounts. That the Tribunal erred by failing to award him punitive and exemplary damages. He prays that the appeal be allowed with costs.

### **Respondent's submissions**

20. The respondents submits that the freezing of the appellant's accounts was not illegal, malicious or unnecessary. That there is no law that prevented the Sacco from freezing its customers' account for lawful reason if it was suspected that there was unusual activity in such accounts pending further investigations. He relies on Benson Odongo Okwiri –Vs- Consolidated Bank of Kenya Limited [2015]eKLR where it was held that: -

“No law prevent the banks from freezing its customers' accounts for lawful reason if it was suspected that there was unusual activity in such accounts...”

21. It is further submitted that the appellant did not demonstrate how the freezing of his accounts caused him loss nor did he quantify the alleged loss. That the appellant's evidence was without any specificity on the losses and he did not show how the Sacco benefitted from the freezing of the accounts at the expense of the appellant. He relies on C Mehta & Company Limited –Vs- Barclays Bank of Kenya Limited (2019)eKLR. He finally submits that the Tribunal held that the respondent had adequately expounded the rationale and justification for freezing the applicant's accounts. The respondent prays that the appeal be dismissed.

### **Analysis and Determination**

22. I have considered the proceedings before the Tribunal, the grounds of the Appeal and the submissions. The issue for determination is whether the Tribunal erred by failing to award the appellant punitive and exemplary damages.
23. This is the 1<sup>st</sup> appellate court. The duty of this Court is to analyze the evidence and evaluate it and come up with its own independent finding while bearing in mind that it did not see the witnesses when they testified and leave room for that. See the case of Selle & Another -vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123. In Mwanasokoni -vs- Kenya Bus Service Ltd. (1982-1988) KAR 278 the Court of Appeal stated that,

“on Appeal it is now well settled that the role of the court is to revisit the evidence on record, evaluate it and reach its own conclusions.”

24. The appellant in his pleadings had stated that the actions by the respondent were malicious and that he claimed that he be awarded General, Punitive and exemplary damages. It is trite law that pleadings and not evidence. What is pleaded is supposed to be supported by the evidence which a party advances or presents in Court. A pleading is defined as a statement in logical and legal form, of the facts which constitute the cause of action or the ground of defence. They are a formal presentation of claims and



defences by parties to a law suit. Section 2 of the Civil Procedure Act (Cap 21 Laws of Kenya) defines “pleading” as follows:

“includes a petition or summons and the statements in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

25. This definition shows that a pleading is an outline of the claimant’s case and the reply thereto. The party has a duty to adduce evidence to support his case. What is pleaded does not amount to evidence and a party is expected to adduce evidence in support of the claims and that is why it is now a well settled principle that a party is bound by his or her own pleadings.
26. The appellant had pleaded that the particulars of malice at paragraph 7 of the claim and stated as follows:
  - a. Freezing the claimant’s accounts without any written pre or prompt post notice and/or a court order authorizing the same.
  - b. Accepting cash deposits into the BOSA account and lending the claimant money and then freezing the said account thereafter.
  - c. Deducting Kshs. 11,000/= from the BOSA account on 30/12/2019 and transferring the same to Claimant’s FOSA shares yet denying the Claimant access to his accounts.
  - d. Freezing the FOSA Account for no reasonable reason or excuse.
  - e. Denying the claimant access to his accounts and thereby denying the claimant a chance to repay the loan hence negatively impacting on his credit rating.
  - f. Refusing to unfreeze the FOSA account despite being furnished with evidence of the source of money.
27. The respondent has submitted that they had noted that a sum of Kshs. 744,000/= which was arbitrarily deposited into the Sacco’s Fosa bank account held at Co-operative bank Meru by one Salome Gacheri Romano who is a spouse of the appellant. The same day the money was removed from the account by Salome Gacheri Romano Kshs. 492,000/= part of the Kshs. 744,000/= and Kshs. 510,000/= was deposited in the appellant’s account. The Sacco called upon the appellant to explain the source of funds but the appellant failed to explain the source of funds but he failed to do so. The respondent submits that it is not true that the issues surrounding the transactions were not communicated to the appellant. That the appellant admitted that the Chief Executive Officer of the respondent’s Sacco who sought to know the source of the money that had passed through the appellant’s Fosa Account held at the Co-operative Bank and later deposited in the appellants account. The respondent has not demonstrated that he sent an SMS or even email or letter or a notice inviting the appellant to explain the transactions/ funds as pleaded. The respondents’ pleading at paragraph -6- of its defence pleads that the accounts were frozen on the recommendation of the respondent’s supervisory committee through the audit department. I agree with the appellant that the closing of a person’s account is arbitrary and amounts to condemning a person unheard. Article 40 of the Constitution guarantees a person’s right to own property. Funds in a customer’s account held in a bank do not cease to be the property of the customer, the bank is a custodian of those funds and the bank cannot deprive a party off those funds without warning or giving the party an opportunity to be heard. Failure to give the party an opportunity to be heard amounts to violation of the person’s right to property.



28. On ground No. 2, the appellant contends that the tribunal erred by holding that the respondent could freeze the applicants account on the basis of actions of the 3<sup>rd</sup> party. The respondent's case was that the suspicious transactions were done by their employee. The respondent in their statement allege that the person who was involved was an employee of the Sacco, PW 2 in this case. This did not lessen the need for the respondent to inform the appellant. The notice is very important as it protects the Sacco customers from engaging in transactions only to be embarrassed when it comes to the point of making the payment. There are now various means of communicating with a customer and informing him that he cannot access the funds. In *Viable Deco Solution Limited –Vs- Co-operative Bank of Kenya Limited (2014)eKLR*, a persuasive decision, it was stated: -

“Notice to the customer of important matters touching on the account held in a bank is almost an indispensable necessity. And although methods of communication are various and varied, most banks have adopted technology in communication of important matters to the customer; a method that is fast and almost instantaneous. The necessity of communication arises from the fiduciary nature of Customer Bank relationship which is undergirded by absolute faith and trust. Ordinarily, full disclosure of any action taken by the Bank, especially those which are adverse to the customer is imperative aspect of that relationship. Therefore, whereas the Applicant agreed “to comply, observe and be bound by the Terms and Conditions made by you [read the Bank] and in force from time to time or as amended by you [read the Bank] pertaining to such account (s) ...and the General Terms and Conditions documented,” any such terms and conditions so made must be brought, one way or other, to the attention of the Applicant without delay. Equally, any adverse actions taken by the Bank on the account held by the Applicant must be brought to the attention of the Applicant without any delay. Freezing an account is an intrusive measure of extreme dimensions and must be fully disclosed to the affected party, unless, the disclosure has been restricted or limited by law through what I call “gag order” which prohibits the Bank or the relevant officer of the Bank from disclosing the existence of a surveillance or freeze order. Of importance, such restriction must be sanctioned by law and under the superadded authority of a court order; they are common in legislations on Bank Fraud, Anti-corruption and Anti-money Laundering laws; for instance, the *Proceeds of Crime and Anti-money Laundering Act*. In the absence of such restriction, a contrary view on disclosure of adverse actions by the bank would be unconscionable and a negation of the law especially in contractual and mutual engagement of a Customer and a bank. Accordingly, informing the Customer of the taking of an adverse action authorized by the contract is not an onerous task whatsoever. In the present case, the Respondent was under an obligation to notify the Applicant of the freezing of its account as well as any other Terms and Conditions that the Applicant was subject to. The Notification could be by making an express reference to or by incorporating existing Terms and Conditions into the signed contract document or by a general advertisement or notification to the customers generally especially of those Terms and Conditions which are made subsequent to the Contract. It is worth of repeat that the methods for communication may be various and varied as long as they achieve the intended result.”

29. I am persuaded by this holding. The Sacco had no basis for freezing the customer's account without notice and without giving him an opportunity to be heard. The holding by the Tribunal was made in error and failed to consider the relationship that existed between the appellant and the respondent.
30. On 3 & 5 ground which the appellant has argued together, the respondent admitted that the Sacco has nothing against the claimant. It beats logic why the respondent went ahead to freeze his accounts.



31. As I have observed in this Judgment, a party is bound by his own pleadings and he is supposed to prove his case based on his pleadings. That is why a pleading is of paramount importance in a suit as it forms the basis of the party's claim against its adversary. Any matter not in the pleadings cannot be accepted in evidence and on the other hand, a party is bound by what he/she pleads. The pleadings by the respondent binds him to the case and he cannot escape from it. He had nothing against the appellant and he cannot now seek to ride on the proceeds of Crime and Anti Money Laundering Act.
32. My view is that even if he had reason to rely on that Act, yet it did not remove the duty to inform the appellant. The respondent did not adduce evidence showing that he had any justification to take such drastic action like freezing of the account. This was stated, in Republic –V- Non-Governmental Organizations and Coordination Board Ex-parte Kalonzo Musyoka Foundation [2018]eKLR the court held as follows
- “ 80. In this case, as there is no legal provision empowering the Respondent to freeze the applicant's bank accounts to preserve the status quo, and as there is no power vested in the respondent Board to dissolve the applicant's Board of directors and or to suspend its operations without giving 14 days' notice to the applicant, I find and hold that the decision taken by the respondent is contrary to law and therefore the Minister would have no jurisdiction to hear and determine an appeal where there was no exercise of powers within the stipulations under the Act. And as was held in the persuasive case of Republic Vs. Non-Governmental Organisations Coordination Board Ex-parte Research Care & Training Programme, Family Aids Care and Education Services 9 RCTP-Faces) [2016]eKLR Justice Weldon Korir observed at page 5 of the decision stated: “The power to order the freezing of a bank account is a very powerful tool indeed. It leaves the account holder at the mercy of the authority directing freezing. In my view such power can only be expressly granted by the law. Even where crime is involved, investigative authorities such as the police and the Ethics and Anti-Corruption Commission do not exercise such power of their own motion. In order to access somebody's account, an investigator has to obtain orders of the court. Under the *Proceeds of Crime and Anti-Money Laundering Act*, 2009, freezing a bank account can only be done upon obtaining a court order.”
81. It follows that if the respondent was suspicious that the applicant was holding foreign currency accounts or held accounts whose sources of funding were not disclosed or non-existent, or that the foundation's accounts were operated by strangers, the respondent should have sought a court order to investigate and temporarily freeze those accounts pending investigations and not just leap into the accounts in an ambush.”
33. The respondent relied on Benson Odongo Okwiri Vs. Consolidated Bank of Kenya Limited [2015]eKLR and the passage cited states that the bank can freeze its customers account for lawful reasons. It is the respondent's submissions that the Sacco had its own Rules and Regulations and because the said rules were violated, some unauthorized transactions were done, the Sacco had a right to suspend the account.



34. The appellant did not lay any material before this court upon which I can award general damages. The appellant did not plead his claim as required under the Law. Order 2 rule 1 of the Civil Procedure Rules provides that: -

“(1) Every pleading in civil proceedings including proceedings against the Government shall contain information as to the circumstances in which it is alleged that the liability has arisen and, in the case of the Government, the departments and officers concerned.”

35. The appellant did not plead nor did he demonstrate the loss he suffered as a result of the unlawful freezing of the account. He did not quantify the loss. It is trite that general punitive damages are not awarded for breach of contract where the loss can be quantified see *Habib Zurich Finance (K) Limited vs. Muthoga & Another* [2002] EA. In *Securicor Courier vs. Benson David Onyango and Another* (2008) eKLR, it was stated that no law prevented banks from freezing its customer's account for lawful reasons if it is suspected there was unusual activity in such account and because such damages are awarded in very limited cases.

36. In *Bank of Baroda Kenya Ltd. Vs. Timwood Products Ltd*, Court of Appeal C.A No. 132/2011 UR cited by the respondent, it was held that punitive or exemplary damages could not be awarded because in Kenya such damages are awarded where there is oppressive, arbitrary and unconstitutional action by servant of state or where the defendant's action was calculated to procure him some benefit not necessarily financial at the expense of the plaintiff.”

37. The appellant did not prove on a balance of probabilities that the respondent benefited by freezing the claimant's account. I find that the Tribunal cannot be faulted for failing to award the general damages as they claim was not properly pleaded and proved. I come to the conclusion that the appeal is without merits and is dismissed. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT MERU THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**L. W. GITARI**

**JUDGE**

**31/10/2024**

